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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

LYLE S. CHANDLER, ADOLPHUS A. MADDOX, and OTHERS SIMILARLY SITUATED, Petitioners,

v.

THE CITY OF DALLAS, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE AMERICAN DIABETES ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE AMERICAN DIABETES ASSOCIATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Diabetes Association is a nationwide, non-profit, voluntary health organization made up of persons with diabetes, health professionals, research scientists, and other concerned individuals. The ADA's mission is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.[1]

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[1] Presently, there are over 13 million Americans with-diabetes, including some 2.8 million persons taking some insulin to help control their diabetes. In 1992 employee productivity

(continued...)

The ADA has 53 state affiliates and more than 800 chapters throughout the United States. With over 290,000 general members and over 10,000 medical professional members, the ADA is the nation's leading voluntary health organization addressing diabetes-related concerns.

Among the ADA's principal concerns is the fair treatment in employment of persons with diabetes. Since 1984, the ADA has advocated for the following policy concerning employment:

> Diabetes as such should not be a cause for discriminating against any person in employment. People with diabetes should be individually considered for employment, weighing such factors as the requirements or hazards of the specific job, and the individual's medical condition and treatment regimen (diet, oral hypoglycemic agents and

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[1](...continued)
losses related to diabetes were $46.6 billion. American Diabetes Association, Direct and Indirect Costs of Diabetes in the United States in 1992 at 19 (1993).

> insulin). Any person with diabetes, whether insulin-dependent or non-insulin-dependent, should be eligible for any employment for which he or she is otherwise qualified.

Consistent with this policy, the ADA has appeared as amicus curiae in suits throughout the United States challenging restrictions on the employment of persons with diabetes.

This case is especially important to the ADA's members because the Fifth Circuit's "controlled condition" definition of "handicap" and the court's categorical "otherwise qualified" analysis vitally affect the interests of millions of Americans with diabetes. In particular, under the court of appeals' decision, individuals with insulin-dependent diabetes who successfully monitor and control their disease will be excluded from the protection of the Rehabilitation Act and its much broader corollary, the Americans With Disabilities Act. In addition, the court of appeals' decision sanctions blanket "as a matter of law" exclusions

of persons with diabetes from certain types of employment, particularly including jobs requiring driving.

The ADA respectfully urges this Court accept review and reverse the court of appeals.

SUMMARY OF ARGUMENT

This case presents the provocative issue of whether a person can be: (1) insufficiently impaired to be "handicapped," but (2) sufficiently impaired to be not "otherwise qualified," within the meaning of the Rehabilitation Act of 1973.

The Fifth Circuit reached this incongruous result with respect to petitioner Lyle Chandler, a person with insulin-dependent diabetes. That result, which subverts the policies of the Rehabilitation Act and its much broader corollary, the Americans with Disabilities Act, requires review and correction.

The court of appeals erred in two particulars whose significance

transcends the individual interests of the present parties:

First, the Fifth Circuit defined petitioner Chandler's handicap by reference to his controlled condition, rather than to his uncontrolled condition. In particular, the court relied upon Mr. Chandler's testimony that "he did not consider his diabetes to be a substantial limitation on his major life activities" (2 F.3d at 1391), without acknowledging the uncontroverted medical testimony that Mr. Chandler's insulin-dependent diabetes, if uncontrolled, would trigger reactions requiring hospitalization and could result in coma, and even death. See Tr. Vol. 19 at 6-7, 10-12.

This "controlled condition" definition of "handicap" violates the Rehabilitation Act's mandate. Indeed, the Fifth Circuit "handicap" analysis conflicts with all other reported cases under the Rehabilitation Act or its state equivalents involving plaintiffs with diabetes. Thus, review is imperative to

resolve a conflict in law. See pp. 7-12, infra.

Second, the court of appeals' "otherwise qualified" determination was categorical, not individualized. The court disregarded Mr. Chandler's particular circumstances, including his work history and his ability to control his disease. Instead, the court determined that "as a matter of law" all persons with insulin-dependent diabetes are not "otherwise qualified" for positions that require driving. 2 F.3d at 1395.

This categorical approach, "based on prejudice, stereotypes, and fear,"[2] subverts the principles of the Rehabilitation Act and the Americans with Disabilities Act. See pp. 12-18, infra.

STATEMENT OF THE CASE

Amicus curiae American Diabetes Association adopts petitioner's Statement of the Case.

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[2] School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987).

Amicus curiae would emphasize the uncontroverted evidence, and the district court's corresponding findings of fact, that: (1) The defendant City had full knowledge of petitioner Lyle Chandler's diabetes at the time it hired him for a job that required driving. (2) Mr. Chandler did, in fact, drive on the job for over three years without incident. (3) All medical evidence at trial established that Mr. Chandler's diabetes was well-controlled and that he is capable of driving safely in his employment. See District Court Findings ¶¶ 20, 24-27, 58, 60.

REASONS FOR GRANTING WRIT

A. The Fifth Circuit's "Controlled Condition" Definition of "Handicap" Subverts the Rehabilitation Act and the Americans With Disabilities Act.

The Fifth Circuit adopted a disturbing new approach to the most basic issue in disability law--the definition of "handicap." As its definitional

baseline, the court referred to petitioner's controlled, rather than uncontrolled, disease.

This "as mitigated" definitional approach, which dramatically limits the protections of both the Rehabilitation Act and the Americans With Disabilities Act, must be corrected.

The EEOC's Interpretive Guidance on Title I of the ADA emphasizes: "The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices." See 29 CFR Part 1630, Appendix A, section 1630.2(h), citing S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) at 23 (emphasis added).

Thus:

> For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

* * *

> . . . . An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.

Id., sections 1630.2(h), 1630.2(j) (emphasis added). Accord Gilbert v. Frank, 949 F.2d 637, 641 (2d Cir. 1991) (plaintiff with kidney cysts was "handicapped" notwithstanding mitigation of impairment through dialysis); Reynolds v. Brock, 815 F.2d 571, 574 (9th Cir. 1987) (plaintiff, whose medication controlled her epileptic seizures, was "handicapped" for purposes of Rehabilitation Act).

Consistent with this "uncontrolled" or "unmitigated condition" baseline, in every reported case under the Rehabilitation Act or its state law equivalents involving plaintiffs with

diabetes--except this case--plaintiffs' diabetes was stipulated, presumed, or found to be a handicap. See Appendix "A" (describing ten federal and state cases treating insulin-dependent or insulin-taking diabetes as "handicap"). See generally Bayler, "Dulling A Needle: Analyzing Federal Employment Restrictions on People with Insulin-Dependent Diabetes," 67 Ind. L.J. 1067, 1078-81 (hereinafter "Dulling A Needle") (canvassing decisions applying Rehabilitation Act Section 504 to persons with diabetes).

Thus, the Fifth Circuit's holding presents a substantial inter-circuit conflict--a conflict only this Court can reconcile.

It is tempting to dismiss the Fifth Circuit's "controlled condition" definition as an aberration. But "aberration" or not, its implications are staggering--not only for millions of Americans with diabetes, but for millions more with other conditions that are mitigated or controlled by medicine or

medical devices. See, e.g., Gilbert v. Frank, supra; Reynolds v. Brock, supra.

Indeed, if the Fifth Circuit is correct, the disability statutes are designed to discourage disabled workers from undertaking mitigation measures. In the Fifth Circuit's view, a person who controls his or her diabetes through monitoring, proper diet, and medication, is not covered by the Rehabilitation Act or the ADA, but a person with diabetes who fails to undertake such measures reaps those statutes' protections.[3]

For persons with insulin-dependent diabetes, the Fifth Circuit's message is clear: "If I don't take insulin, I'll die. If I do, I'll lose my job."

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[3] Uncontroverted medical evidence in the record establishes that: (1) plaintiff Chandler has diabetes mellitus that requires insulin for control; (2) unless properly controlled, such diabetes can result in coma and death; and (3) Mr. Chandler has himself experienced diabetic reactions requiring hospitalization when his disease was out of control. See Tr. Vol. 19 at 6-7, 9-12; District Court Findings ¶ 59.

Congress never intended such a macabre choice. Review should be allowed.

B. The Fifth Circuit's Categorical "Otherwise Qualified" Approach Sanctions Blanket Exclusions of Handicapped Workers.

Even without its erroneous definition of "handicap," the Fifth Circuit's decision commands review. The court, in applying a catagorical "otherwise qualified" analysis, held that persons with insulin-dependent diabetes may, as a class, be excluded from jobs requiring driving. This sort of non-individualized approach, sanctioning blanket exclusions of handicapped workers, is the vice that the Rehabilitation Act and, more recently, the Americans with Disabilities Act were designed to remedy. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987).

In Arline, this Court generally endorsed the need for individualized inquiries in determining whether

handicapped individuals are "otherwise qualified" for particular jobs:

> [I]n most cases, the district court will need to conduct an individualized inquiry and make the appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.

480 U.S. at 287.

Consistent with Arline, the courts in all but one of the other reported cases involving claims by plaintiffs with diabetes under the Rehabilitation Act or its state law equivalents have engaged in individualized "otherwise qualified" inquiries.[4] In some cases, courts have

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[4] The sole exception is Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), aff'd without opinion, 865 F.2d 592 (3d Cir. 1989) (described in Appendix A).

(continued...)

found particular plaintiffs to be "otherwise qualified";[5] in others,

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[4](...continued)
There, the court sustained a blanket exclusion of persons with insulin-dependent diabetes from employment as FBI special agents or investigative specialists. See 692 F. Supp. at 517-521. The Davis decision has been severely, and correctly, criticized as failing to address scientific and medical advances which permit rigorous individualized monitoring and control and reasonable accommodation of persons with diabetes. See "Dulling A Needle," supra, 67 Ind. L.J. at 1081-90.

A recent outstanding example of improved medical/scientific understanding of diabetes is the publication of the results of the Diabetes Control and Complications Trial. See DCCT Research Group, "The Effect of Intensive Treatment of Diabetes on the Development and Progression of Long-term Complications in Insulin-dependent Diabetes Mellitus," N. Engl. J. Med. 1993; 329:977-86.

[5] E.g., Com. Dept. of Transp. v. Tinsley, 564 A.2d 286, 288 (Pa. Cmwlth. 1989) (described in Appendix "A") ("DOT's speculation about the possible effects of diabetes is not appropriate. The proper inquiry must be directed to Tinsley herself and the effects of her handicap upon her job performance.") (original

(continued...)

particular plaintiffs have found to be not "otherwise qualified."[6]

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[5](...continued)
emphasis); Fraser Shipyards, Inc. v. DILHR, 13 FEP Cases 1810 (Wisc. Cir. Ct. 1976) (described in Appendix "A") ("While the petitioner did demonstrate that individual diabetics may be unqualified to fill the position of welder in a shipyard because those persons may have a history of blackouts or may be so severely disabled by the disease as to require precise regularity of schedule, the petitioner made no such showing with respect to these claimants.").

[6] E.g., Serrapica v. City of New York, 708 F. Supp. 64, 73 (S.D.N.Y. 1973) (described in Appendix "A") ("Defendant has demonstrated, based on plaintiff's medical history and current laboratory testing, that the disqualification was based on valid considerations of safe performance of the duties of the job as Sanitation Worker."); Miller v. Sioux Gateway Fire Dept., supra, 497 N.W.2d 838, 842 (Iowa 1993) (described in Appendix "A") ("We find the nature of a firefighter's duties justifies finding that Miller, a diabetic who is not in control of his disease, is not qualified for the firefighter position.") (emphasis added). Accord Barth v. Gelb, 761 F. Supp. 830, 835-36 (D.D.C. 1991), aff'd 2 F.3d 1180 (D.C. Cir. 1993) (described in Appendix "A") (engaging in exacting, individualized review of

(continued...)

The particular results are immaterial. What is material is that the courts have recognized the legal and practical/medical need to examine each worker's individual medical circumstances and work history vis à vis the demands of a particular job. See Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985) ("[A]n employer must gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of potential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job."). Accord 29 CFR Part 1630, Appendix A, § 1630.2(r) (in determining whether individual's disability poses a significant risk of substantial harm to others, employer is to engage in individualized determination, including consideration of the handicapped person's experience with

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[6](...continued)
plaintiff's medical condition and job demands).

his or her disability in previous similar positions).

The present record exemplifies the wisdom of such an individualized inquiry--and the folly of the Fifth Circuit's rationale. It is undisputed that petitioner Chandler drove on the job for years without incident. See District Court Findings, ¶¶ 23, 25-27. Moreover, the overwhelming weight of medical testimony at trial (which the district court accepted) established that because Mr. Chandler's condition was well-controlled, he was capable of driving safely and without increased risk notwithstanding his disease. See District Court Findings, ¶ 58. Finally, and perhaps ironically, the Federal Highway Administration has amended the federal licensing regulation (49 CFR § 391.41(b)) on which the Fifth Circuit premised its categorical, per se approach to allow waivers for insulin-treated commercial drivers who engage in specified monitoring and control measures. See 58 Fed. Reg. 40690 (July 29, 1993).

The Fifth Circuit's categorical "otherwise qualified" analysis is wrong. Wrong for Lyle Chandler. Wrong for millions of other Americans with disabilities who ask only to be judged on their own qualifications.

Review is imperative.

CONCLUSION

For the foregoing reasons, amicus curiae American Diabetes Association supports petitioners' prayer that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED this 25th day of February, 1994.

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APPENDIX "A"

Reported Federal and State Decisions Treating Insulin-Dependent or Insulin-Taking Diabetes As "Handicap":

- Bentivegna v. Dept. of Labor, 690 F.2d 619, 621 (9th Cir. 1982) (city's termination of employee with insulin-dependent diabetes pursuant to city's control requirement was unlawful; plaintiff's status as a "handicapped person" under the Rehabilitation Act was "not disputed").

- Wood v. Omaha School District, 785 F. Supp. 1441, 1447 (D. Neb. 1992) (school bus drivers with insulin-using ("Type II") diabetes were "handicapped" under Rehabilitation Act; however, sustaining transfer of such drivers to non-driving positions because reasonable accommodation could not be implemented), rev'd on other grounds, 985 F.2d 437 (8th Cir. 1993) ("handicap" disposition not disputed on appeal; remanding "reasonable accommodation" disposition).

- Barth v. Gelb, 761 F. Supp. 830 (D.D.C. 1991) aff'd, 2 F.3d

1180 (D.C. Cir. 1993) (person with insulin-dependent diabetes who applied for job with Voice of America as Foreign Service Specialist was "handicapped individual" under Rehabilitation Act; agency's failure to waive medical clearance requirement did not violate Act's "reasonable accommodation" mandate).

- Serrapica v. City of New York, 708 F. Supp. 64, 73 (S.D.N.Y. 1989) ("Plaintiff's diabetes constitutes a handicap under the [Rehabilitation Act]"; however, concluding that plaintiff was not individually "otherwise qualified" for appointment as city sanitation worker).

- Davis v. Meese, 692 F. Supp. 505, 517 (E.D. Pa. 1988), aff'd without opinion, 865 F.2d 592 (3d Cir. 1989) ("An insulin-dependent diabetic is clearly a 'handicapped person' within the meaning of the Rehabilitation Act"; however, sustaining FBI's policy against employing persons with insulin-dependent diabetes as special agents or investigative specialists on "otherwise qualified" grounds).

- Brown v. County of Genesee, 37 Fair Empl. Prac. Cas. (BNA), 1595, 1596 (W.D. Mich. 1985)

(jail matron applicant who had insulin-dependent diabetes was "handicapped" within meaning of Rehabilitation Act: "Clearly, the fact that plaintiff's diabetic condition caused her to fail the [pre-employment physical] examination indicates that that impairment was treated as one that substantially limited a major life activity, working.").

- Miller v. Sioux Gateway Fire Dept., 497 N.W.2d 838, 841 (Iowa 1993) (firefighter's insulin-dependent diabetes was "disability" within meaning of Iowa Civil Rights Act).

- Com. Dept. of Transp. v. Tinsley, 564 A.2d 286 (Pa. Cmwlth. 1989) (license revocation of school bus driver with insulin-dependent diabetes violated Rehabilitation Act; state did not contest plaintiff's status as "handicapped individual").

- Jackson v. State, 544 A.2d 291, 297-98 (Me. 1988), cert. denied, 491 U.S. 904 (1989) (state's blanket prohibition on licensing persons with insulin-dependent diabetes as school bus drivers violated Rehabilitation Act; state did

not dispute that insulin-dependent diabetes was "handicap" within meaning of Act).

- Fraser Shipyards, Inc. v. DILHR, 13 Fair Emp. Prac. Cases 1809 (Wisc. Cir. Ct. 1976) (employer violated Wisconsin Fair Employment Act in refusing to hire person with insulin-dependent diabetes as welder; insulin-dependent diabetes assumed to be "handicap" within meaning of state act).